In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 151

UNITED STATES OF AMERICA, APPELLANT

v.

E. I. DUPONT DE NEMOURS AND COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

Appellees argue (Motion to Affirm, pp. 3, 18, 20, 23-24, 31) that although the appeal in terms presents the issue whether the district court applied erroneous legal standards in evaluating the evidence in this case, the Government is actually seeking a trial *de novo* in this Court of the factual questions which the district court decided against it. They state (p. 22) that the district court fully considered all the relevant factors in reaching its conclusion that du Pont has not had, and today does not have, "practical or working control" of General Motors, and that

since the court made "careful findings on each aspect of the control issue," there is no occasion for this Court to review that determination. Further, they argue (p. 27) that even if the Government's contention on the control issue were to be upheld, it still could not prevail because the court found, on all the evidence, that "General Motors was not at all influenced in its purchasing practices or in the exploitation of its chemical discoveries by its relationship to du Pont." Appellees also deny the Government's contention that the court evaluated the evidence as to the trade relationships between du Pont and General Motors on the assumption that the two companies dealt at arm's length (p. 27). They state (p. 23) that the arm's-length question "was precisely the issue to which the evidence was directed," and that the district court "[o]n the basis of all that evidence" found that an arm's-length relationship had existed. These contentions, we submit, are incorrect.

1. Appellees argue (p. 21) that the district court "did not consider the question of control in terms of majority control; it considered it in terms of 'practical or working control.'" But analysis of the court's findings, we submit, clearly shows that the court assumed that "practical or working control" could not exist unless du Pont "has been in a position to act as if it owned a majority of General Motors stock" (Op. 33), or had "conduct[ed] itself, for the past 25 years, as though it were the owner of a majority of the

General Motors stock" (Op. 40).* Only such a narrow concept of control—and one which, as we pointed out in our Jurisdictional Statement (p. 18), is clearly erroneous because it "[i]gnores the realities of intercorporate relations"—could possibly explain the court's ultimate conclusion that du Pont's ownership of 23% of the outstanding stock of a company the size of General Motors, the wide dispersal of the remaining stock, and the long history of close working relations between the two companies, "was insufficient to give du Pont 'practical or working control' of General Motors.".

Appellees urge (Motion to Affirm, p. 21) that this Court should not review the control question because the district court "devoted 32 pages of the opinion (pp. 10-42) to a careful review of the history of every aspect of du Pont's stock interest," and concluded on the basis of such review that no control existed. But, as we pointed out in our Jurisdictional Statement, that "careful review" involved an application of erroneous legal principles. The question whether the district court erred in concluding that du Pont does not control General Motors does not call for a reweighing of the evidence by this Court, but requires, princi-

* Such an analysis, of course, requires full briefing. We merely note here our disagreement with the appellees' interpretation of numerous findings and our belief that their discussion of selected findings fails to provide a full and correct picture, on the basis of which the Court could be justified in entering a summary affirmance on the merits without further briefs or argument.

pally and fundamentally, an inquiry into, and determination of, the proper standards for ascertaining the existence of control of a large modern corporation; and reappraisal of the district court's findings in the light of such standards.

2. If we are correct in our contention that the court reached an erroneous conclusion on the control question, then any holding by the court that an arm's-length relationship existed between du Pont and General Motors was similarly erroneous. The error of the district court on the one issue would inevitably infect its determination of the other. It requires no elaborate argumentation to demonstrate that the concept of arm's-length bargaining necessarily implies that neither party can subject the other to any influence or pressure, whether subtle or overt. If this Court should agree that the district court resolved the control issue by applying erroneous legal standards, a similar infirmity would arise in the district court's refusal to find that General Motors officials could not help but be aware of the controlling position which du Pont held in their company, and that their business judgment in deciding whether to deal with du Pont or with a competitor of du Pont necessarily reflected that awareness. If proper legal standards be applied, such intercorporate dealings cannot be called "arm's-length" bargaining in any relevant or meaningful sense.

3. Moreover, if (as we contend) du Pont has the power to control General Motors and to influence or dictate its course of conduct, it is un-

necessary to determine, for purposes of application of Section 7 of the Clayton Act, the full extent to which it has been demonstrated that the control has been actively exercised in the past. For as long as that power to control continues to exist, the power to restrain trade similarly exists, and can be exercised whenever du Pont wishes to do so. Section 7 certainly requires no more.

CONCLUSION

Throughout their motion appellees stress the proposition that control and its exercise must be determined in the light of the special pertinent circumstances. Ascertainment of these circumstances, they point out, involves determinations of fact. But whether one describes questions of "control" and "exercise of control" as involving finally a determination of ultimate facts or the reaching of legal conclusions, a basic consideration is that the ultimate determination may also involve in important and crucial measure the application of certain legal concepts and standards, and the validity of certain inferences. We believe that the court below applied erroneous legal standards and that it drew unwarranted inferences from its subsidiary findings. On such questions, the Government respectfully submits, it is not only the prerogative but the duty of the appellate tribunal to afford effective review. The function of the expediting procedure provided by Congress in civil antitrust cases instituted by the Government is to assure prompt and effective review by

the highest Court of cases having unusually important ramifications in the economic life of the country. This case falls notably in that category. Appellees would, in effect, stand the Expediting Act on its head. In lieu of effective review by this Court in the large and important antitrust case, they would have it that there shall be no review at all because the large case may also seem a forbidding case. In effect, the more important and pervasive the issue involved, the less likelihood there would be of review.

We submit that the questions tendered by this appeal are plainly of such a character as to require full exploration on briefs and oral argument. The motion to affirm should be denied, and probable jurisdiction should be noted.

Respectfully submitted,

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